

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MYESHA MITCHELL,  
Plaintiff,  
  
v.  
THE CITY OF TUKWILA, *et al.*,  
Defendants.

Case No. C12-238RSL

ORDER GRANTING IN PART  
DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

This matter comes before the Court on Defendants' "Motion for Summary Judgment on False Arrest, NIED and 8th Amendment" (Dkt. # 20). For the reasons set forth below, the Court GRANTS Defendants' motion IN PART.<sup>1</sup>

**I. BACKGROUND**

This case concerns Ms. Myesha Mitchell's claims against Defendant City of Tukwila and Defendant Steve Gurr, a Tukwila police officer, for damages related to Mr. Gurr's alleged use of unreasonable force against Ms. Mitchell on February 5, 2010. Dkt. # 1; accord Dkt. # 26. Specifically, Ms. Mitchell alleges that Officer Gurr stopped

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<sup>1</sup> The Court also GRANTS Plaintiff's motion (Dkt. # 25) to accept the late filing of her opposition. The Court notes, however, that it is entirely unsympathetic to her counsel's assertion that he is somehow not to blame for his own failure to update his own e-mail address. It also cannot fathom how counsel's stated unavailability from June 28, 2012, to July 13, 2012, see Dkt. # 18, has any bearing on his ability to timely respond to Defendants' motion, which was filed July 19, 2012.

1 her without justification after she left her vehicle parked in front of a stranger's house,  
2 Dkt. # 26 at 2, and tased her without justification "again and again," *id.* at 3, before  
3 placing her under arrest, Dkt. # 1 at ¶ 4.8. She asserts claims for false arrest and  
4 imprisonment under state and federal law, negligent and intentional infliction of  
5 emotional distress, excessive force in violation of the Fourth Amendment, cruel and  
6 unusual punishment in violation of the Eighth Amendment, a due process violation in  
7 violation of the Fifth Amendment, assault and battery, and negligence. Dkt. # 1 at 6–9.

## 8 II. DISCUSSION

9 The Court can enter judgment as a matter of law only if it is satisfied that there is  
10 no genuine issue of material fact. Fed. R. Civ. P. 56(c). The moving party as to each  
11 issue bears the initial burden of informing the Court of the basis for summary judgment.  
12 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It must prove each and every  
13 element of its claims or defenses such that "no reasonable jury could find otherwise."  
14 Eli Lilly & Co. v. Barr Labs., Inc., 251 F.3d 955, 962 (Fed. Cir. 2001). In doing so, it is  
15 entitled to rely on nothing more than the pleading themselves. Celotex, 477 U.S. at  
16 322–24. Only once the moving party makes that initial showing does the burden shift  
17 to the nonmoving party to show by affidavits, depositions, answers to interrogatories,  
18 admissions, or other evidence that summary judgment is not warranted because a  
19 genuine issue of material fact exists. *Id.* at 324.

20 Notably, to be material, the fact must be one that bears on the outcome of the  
21 case. A genuine issue exists only if the evidence is such that a reasonable trier of fact  
22 could resolve the dispute in favor of the nonmoving party. Anderson v. Liberty Lobby,  
23 Inc., 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or is not  
24 significantly probative . . . summary judgment may be granted." *Id.* at 249–50. In  
25 reviewing the evidence "the court must draw all reasonable inferences in favor of the  
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1 nonmoving party, and it may not make credibility determinations or weigh the  
2 evidence.” Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150 (2000).

3 With these standards in mind, the Court turns to each of the disputed claims.

#### 4 **A. False Arrest and Imprisonment**

5 The Court starts with Defendants’ contention that it is entitled to judgment as a  
6 matter of law on Ms. Mitchell’s federal and state false arrest and imprisonment claims.

7 Defendants’ position is straightforward. See Dkt. # 20 at 6. They correctly note  
8 that “[t]he existence of probable cause is a complete defense to an action for false arrest,  
9 false imprisonment, or malicious prosecution,” McBride v. Walla Walla Cnty., 95 Wn.  
10 App. 33, 38 (1999)); see Pierson v. Ray, 386 U.S. 547, 555 (1967) (“[A] peace officer  
11 who arrests someone with probable cause is not liable for false arrest . . . .”); Bender v.  
12 City of Seattle, 99 Wn.2d 582, 603 (1983) (Dimmick, J., concurring) (“As indicated by  
13 the majority, it is well established that the causes of action for malicious prosecution and  
14 false arrest require that plaintiff prove want of probable cause and malice.”), and they  
15 point out that, through her attorney, Ms. Mitchell stipulated to the existence of probable  
16 cause in state court, see Dkt. # 29 at 9–10; Dkt. # 30 (Exhibit 6).

17 In response, Ms. Mitchell argues three points. First, she asks the Court to allow  
18 her additional time pursuant to Federal Rule of Civil Procedure 56(d) to obtain more  
19 discovery concerning the circumstances under which she was arrested.<sup>2</sup> Dkt. # 24 at  
20 11–12. Second, her counsel suggests that she may not have stipulated at all. Id. at 13.  
21 And, third, she argues that the Court must scrutinize the validity of her stipulation as it  
22 would a “release-dismissal agreement.” Id. at 13–14. The Court disagrees.

23 First, Ms. Mitchell has failed to demonstrate entitlement to a Rule 56(d)  
24 continuance. Though the Ninth Circuit has made clear that “[a] party requesting a

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25 <sup>2</sup> Ms. Mitchell’s counsel actually makes his request pursuant to Rule 56(f). The Court  
26 notes for his benefit that the Rule was amended nearly two years ago.

1 continuance pursuant to Rule 56([d]) must identify by affidavit the specific facts that  
2 further discovery would reveal, and explain why those facts would preclude summary  
3 judgment,” Tatum v. City & Cnty. of San Francisco, 441 F.3d 1090, 1100 (9th Cir.  
4 2006),<sup>3</sup> Ms. Mitchell has not submitted any affidavit in support of her request. See Dkt.  
5 # 24; Dkt. # 26 (no reference of request to continue); Dkt. # 27 (same). That failure  
6 alone justifies the Court’s denial of her request. Kitsap, 314 F.3d at 1000 (“Failure to  
7 comply with these requirements is a proper ground for denying relief.”); Campbell, 138  
8 F.3d at 779 (same).

9 Furthermore, the Court notes that even were it to rely on the “[r]eferences in [Ms.  
10 Mitchell’s] memoranda,” it would still find that Ms. Mitchell has failed to demonstrate  
11 cause for continuance. See Tatum, 441 F.3d at 1100. Rather than identifying the  
12 “specific facts that further discovery would reveal,” id., she proposes only a broad  
13 fishing expedition, noting her desire to discover “[a]ny and all video surveillance . . . ,  
14 [a]ny and all records . . . , [a]ny and all audio recordings . . . ,” etc. Dkt. # 24 at 12.  
15 This request is both non-specific and entirely speculative—each an independent basis  
16 for denying her request. See Campbell, 138 F.3d at 779–80 (“[D]enial of a Rule  
17 56([d]) application is proper where it is clear that the evidence sought is almost certainly  
18 . . . pure speculation.” (quoting Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991)).  
19 Each broad topic is also completely unrelated to the singular fact at issue: Ms.  
20 Mitchell’s alleged factual stipulation. See id. (affirming the denial of a Rule 56(d)  
21 motion because “the facts that the defendants hope to elicit during discovery are not  
22 essential to resisting California’s summary adjudication motion”).

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23 <sup>3</sup> Accord United States v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002)  
24 (“The facts supporting a Rule 56([d]) motion must be set forth in an accompanying affidavit.”).  
25 “References in memoranda and declarations to a need for discovery do not qualify as motions”  
for discovery under the summary judgment rule. State of Cal. ex rel. Cal. Dep’t of Toxic  
Substances Control v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998).

1 Next, the Court finds no merit in Ms. Mitchell's equivocation about whether she  
2 did in fact stipulate to the existence of probable cause. The Court thinks it worthwhile  
3 to note that, in her affidavit, Ms. Mitchell does not dispute any of Defendants'  
4 contentions regarding the state court's multiple findings of probable cause or her own  
5 stipulation. Dkt. # 26. And there appears to be good reason. Defendants have provided  
6 the Court with multiple state court documents reflecting findings of probable cause, as  
7 well as audio recordings of an additional finding and Ms. Mitchell's stipulation. See  
8 Dkt. # 30. Accordingly, because counsel's argument is not evidence, the Court finds  
9 that Ms. Mitchell has failed to raise any genuine issue as to either the state court  
10 findings or her stipulation. Celotex, 477 U.S. at 324.

11 Finally, the Court sees no reason not to hold Ms. Mitchell to her stipulation. See  
12 Dkt. # 30 (audio recording). The Ninth Circuit has "repeatedly held that criminal  
13 defendants are bound by the admissions of fact made by their counsel in their presence  
14 and with their authority." United States v. Hernandez-Hernandez, 431 F.3d 1212, 1219  
15 (9th Cir. 2005); Del Monte v. Cnty. of San Diego, Civil No. 06cv872-L(WMc), 2008  
16 WL 3540245, at \*3 (S.D. Cal. 2008) ("Because of the stipulation as to probable cause in  
17 the state court criminal case, plaintiffs' claim based upon wrongful arrest must be  
18 dismissed with prejudice."). The same is true of Washington courts. Torrey v. City of  
19 Tukwila, 76 Wn. App. 32, 40 (1994) (holding that plaintiffs' "stipulations as to probable  
20 cause for arrest would defeat any independent state claim for false arrest").

21 Moreover, Ms. Mitchell's reliance on Lynch v. City of Alhambra, 880 F.2d 1122,  
22 1126-29 (9th Cir. 1989), is misplaced. As its name should suggest, application of the  
23 "release-dismissal agreement" doctrine is dependent on the existence of some sort of  
24 release-dismissal agreement. See id. at 1124 ("The only issue in this appeal is whether  
25 the release signed by Lynch is enforceable."); see also Town of Newton v. Rumery, 480  
26 U.S. 386, 392 (1987) (applying contract law principles to determine whether a waiver of

1 a federal right to sue was unenforceable). And in this case, Ms. Mitchell has not  
2 presented any evidence that would allow the Court even to infer that her stipulation was  
3 the result of some sort of dismissal agreement. To the contrary, as discussed, Ms.  
4 Mitchell filed only a single affidavit in support of her opposition to Defendants' motion.  
5 See Dkt. # 26. And that affidavit makes no mention whatsoever of any stipulation, let  
6 alone any underlying agreement. See id. Accordingly, Ms. Mitchell has failed to raise a  
7 genuine factual issue as to the applicability of the doctrine, and therefore, Defendants  
8 are entitled to summary judgment on her false arrest and false imprisonment claims.

### 9 **B. Negligent Infliction of Emotional Distress**

10 The Court next considers Defendants' assertion that Washington's public duty  
11 doctrine precludes Ms. Mitchell's claim against Officer Gurr for negligent infliction of  
12 emotional distress. It finds that it does not.

13 "Under the public duty doctrine, a plaintiff alleging negligence against a  
14 government entity must show that a duty was owed specifically to the plaintiff, not to  
15 the public in general." Munich v. Skagit Emergency Commc'ns Ctr., 161 Wn. App.  
16 116, 121 (2011). The doctrine is subject to an important limit, however. It "provides  
17 only that an individual has no cause of action against law enforcement officials for  
18 failure to act." Robb v. City of Seattle, 159 Wn. App. 133, 146–47 (2010). It does not  
19 protect officers being sued for negligence on account of an affirmative act. Id.; Coffel v.  
20 Clallam Cnty., 47 Wn. App. 397, 403 (1987) ("The doctrine provides only that an  
21 individual has no cause of action against law enforcement officials for failure to act.  
22 Certainly if the officers do act, they have a duty to act with reasonable care.").

23 In this case, Ms. Mitchel's claim is premised on her tasing by Officer Gurr.  
24 Dkt. # 1 at ¶ 7.2. This is an affirmative act to which the public duty doctrine does not  
25 apply. Robb, 159 Wn. App. 146–47 (rejecting the contention that "the duty of a  
26 governmental actor is determined solely by resort to the public duty doctrine and the

four recognized exceptions”). Accordingly, the Court DENIES Defendants’ public-duty based argument for the dismissal of this claim. See Garnett v. City of Bellevue, 59 Wn. App. 281, 286–87 (1990) (recognizing a cause of action against police officers for negligent infliction of emotional distress).

### C. Eighth Amendment

Ms. Mitchell concedes that her claim under the Eighth Amendment is invalid and should be dismissed. Dkt. # 24 at 2 n.3. Accordingly, the Court GRANTS Defendants’ motion as to that claim.

### III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants’ motion IN PART. It DISMISSES Ms. Mitchell’s state and federal claims for false arrest and imprisonment and for any alleged violation of the Eighth Amendment. It DENIES, however, Defendants’ motion as to her negligent infliction of emotional distress claim.

Finally, the Court also thinks it is important to note that it is troubled by the inconsistencies between Ms. Mitchell’s declaration, Dkt. # 26, and her responses to Defendants’ request for admission. See Dkt. # 29 at 3–6 (detailing the inconsistencies). It notes for her and her counsel’s benefit that both are subject to sanction under Federal Rule of Civil Procedure 26(g)(3) for disclosures that are not “complete and correct at the time made.” It encourages them to consider whether a correction is warranted, see Fed. R. Civ. P. 26(e), assuming of course that she has not already admitted each by virtue of her tardy response. See Dkt. # 29 at 5 n.5 (noting Fed. R. Civ. P. 36(a)(3)).

DATED this 24<sup>th</sup> day of September, 2012.



Robert S. Lasnik  
United States District Judge